

STATE OF MICHIGAN
COURT OF APPEALS

SCOTT KEVIN PECK,

Plaintiff-Appellee,

v

SARAH CATHERINE PECK a/k/a SARAH
CATHERINE CLINARD,

Defendant-Appellant.

UNPUBLISHED

March 8, 2012

No. 306329

Clare Circuit Court

Family Division

LC No. 2007-900331-DM

Before: WILDER, P.J., and TALBOT and SERVITTO, JJ.

SERVITTO, J. (*dissenting*).

I respectfully dissent.

As indicated by the majority, we review the trial court's ultimate ruling on a motion for change of domicile for an abuse of discretion, but review its findings of fact regarding the statutory change of domicile factors under the great weight of the evidence standard. *McKimmy v Melling*, 291 Mich App 577, 581; 805 NW2d 615 (2011). When reviewing under the great weight of the evidence standard, we may not substitute our judgment on questions of fact unless the facts clearly preponderate in the opposite direction. *Rittershaus v Rittershaus*, 273 Mich App 462, 472–473; 730 NW2d 262 (2007). Upon review of the record, I cannot conclude that the trial court's finding of facts with regard to the relevant factors are against the great weight of the evidence or that its ultimate determination to deny defendant's motion for a change in domicile was an abuse of discretion. As such, I would affirm the trial court's order denying defendant's motion for a change of domicile.

The trial court appropriately considered the factors set forth in MCL 722.31(4)(a)-(c) in making its determination whether to grant defendant's motion for change of domicile. Both parties agree that factors (d) and (e) are not at issue. With respect to factor (4)(a) "whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent," the trial court correctly points out that defendant's employment in Arkansas is nearly identical to her employment in Michigan. Her title and responsibilities are the same, and defendant acknowledges that it is a "lateral" move. While defendant claims that she would have more opportunity for promotion, there is nothing in the record, aside from her own hope and her statements that such opportunities *may* be available, to support this claim.

Aside from the claim of potential for advancement, defendant received a \$2500 per year increase in salary and a one-time moving bonus of \$4500. Her employer also purchased her home in Michigan at fair market value to enable her to move to Arkansas. Taking into consideration defendant's proposal that the child would be traveling to Michigan approximately once per month (at defendant's expense) in order to foster his relationship with plaintiff, at an estimated cost of \$400 per trip, financial improvement was not likely a benefit to be seen by the minor child and/or defendant by the move to Arkansas. Moreover, while defendant focused heavily upon the year-round Arkansas school she anticipated placing the child in as a benefit, as recognized by the majority, there is nothing in the record to suggest that the educational opportunities would necessarily be better in Arkansas. Defendant has not established that a move to Arkansas has the capacity to improve the quality of life for the child.

Factor (4)(b) requires an evaluation of "the degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule." As to this factor, the trial court found that plaintiff complied with and made use of every opportunity available to exercise parenting time as provided in the judgment. The court also found that defendant's plan to move to Arkansas did not appear to be motivated by a desire to frustrate plaintiff's parenting time, but to be motivated by her own "somewhat selfish desires. Her ambition is what has driven this move." The record supports the trial court's conclusion that defendant's desire to be employed in an area that *may* provide an opportunity for advancement appears to have been the driving force behind the move. Plaintiff even admits that he does not believe that defendant is deliberately trying to frustrate his parenting time or to keep him from the child. This factor is thus not at issue.

Factor (4)(c) directs the court to consider "The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification." Prior to defendant's move to Arkansas, plaintiff resided only 90 miles from the minor child and, as a result, was able to attend his school events, some of his sporting events, some of his doctor appointments and to spend at least alternate weekends with the child. Obviously, a distance of 950 miles between plaintiff and the child would make such activities much more infrequent, if not impossible. But, when the domicile change of a child is being considered, the new parenting time plan "need not be equal with the old [parenting time] plan, as such equality is not possible." *McKimmy*, 291 Mich App at 583. Instead, the new plan needs only to provide "a realistic opportunity to preserve and foster the parental relationship previously enjoyed by the nonrelocating parent." *Id.*

In this matter, defendant proposed enrolling the child in a year round school which she felt would not only be better suited to address his needs, but would also allow him to spend approximately one week per month with plaintiff. Defendant indicated that she would provide all transportation and all expenses associated with transporting the child from Arkansas to Michigan and back for the trips, and would also allow the child to spend all holidays with plaintiff to ensure that he and the child would have adequate time together. An ambitious and liberal plan to be sure, but is it *realistic*? Defendant's proposition is that a now seven-year-old

with ADHD and other educational difficulties spend an inordinate amount of time traveling by car or plane each month and spend all holidays with plaintiff, at considerable financial expense to defendant. Additionally, the extra-curricular activities that defendant had the child in and presumably plans to continue him in, along with his several times per month educational therapy sessions and proposed tutoring would all be impacted by such a strenuous travel schedule.

The majority, in my opinion, places too much negative focus on the trial court's statement that no order would be able to provide plaintiff with the positive and regular parenting time he has enjoyed. While perhaps not artfully stated, the trial court's statement is nonetheless true. With the parenting time schedule that was in place, plaintiff never went more than twelve days without seeing his son and was able to attend his school events, school meetings, some doctor appointments, and occasional sporting events. If a move to Arkansas were permitted, no matter what parenting time schedule was put into place, plaintiff would frequently go more than twelve days without seeing his son, and would not be able to attend those school and sporting events or school and medical appointments. We must be careful to balance the child's right to a close a nurturing relationship with *both* parents and a long distance undeniably makes it difficult. Though, as indicated by the trial court, if the move were permitted, I, too, am confident that the parties would comply with a modification of plaintiff's parenting time in some fashion that would foster the relationship between plaintiff and the child, the one suggested by defendant is unrealistic.

Based on the record as a whole and considering the factors in their totality, I would not find that the trial court abused its discretion in denying defendant's motion for a change in domicile.

I would also find that the trial court did not abuse its discretion in changing physical custody of the child from defendant to plaintiff. In reviewing child custody decisions, we apply three standards of review:

The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [*Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903, 906 - 907 (2009)(citations omitted)]

On the issue of change of custody, defendant challenges only the trial court's findings as to best interest factors (c), (d), (j), and (l). The trial court found the parties to be equal as to factor (c), "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs." Defendant contends that this factor should have favored her based upon the evidence that she has been the child's advocate with

respect to his medical needs. As indicated by the majority, although the record does support that defendant has taken the lead in this regard, there is no evidence to suggest that plaintiff does not have the capacity and disposition to do so. In fact, plaintiff indicated that defendant tended to unilaterally make decisions regarding the child's medical care and inform plaintiff later as to what had transpired, without seeking his input. There is thus no error in the trial court's conclusion that the parties are equal as to this factor.

The trial court found that factor (d), "the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," weighed in favor of plaintiff. The basis for its finding was that in moving to Arkansas, defendant was subjecting the child to a new environment, while plaintiff had an established residence in Grayling with which the child was very familiar. As pointed out by defendant, she moved to Arkansas prior to the motion hearing and the child had never lived with plaintiff on a full-time basis. Thus, both the home in Arkansas and the home in Grayling would be a "new" permanent home for the child and he would be attending a new school whether residing in either home. While it is true that the child had not permanently lived with plaintiff, he was still familiar with plaintiff's home. It was not a completely new environment for him as was the home in Arkansas. The child would be sleeping in the same home that he had been when he was with plaintiff and likely visiting the same places he had been visiting when he was previously with plaintiff, providing him with stability and continuity. The trial court did not err in finding that this factor weighed in favor of plaintiff.

Factor (j) addresses "the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." The trial court found this factor to favor plaintiff based upon its conclusion that defendant consistently failed to include plaintiff in legal custody decisions. According to the testimony, defendant frequently made singular decisions concerning the child's medical care and schooling and then advised plaintiff about what had happened, rather than seeking his input. And, while defendant encouraged contact between plaintiff and the child after the parties' divorce, she also unilaterally decided to accept a job in another state, knowing that plaintiff did not agree to his son moving so far away. The trial court did not err in concluding that this factor favored plaintiff.

Factor (l) concerns "any other factor considered by the court to be relevant to a particular child custody dispute." Considering defendant's move to Arkansas to accept a job nearly identical to the one she held in Michigan, the trial court found that this factor favored plaintiff. As indicated by the trial court, defendant sold her Michigan home, moved to Arkansas to accept a nearly identical job with her same employer, and defendant has stated that she would not return to Michigan, no matter what the trial court's ruling. The trial court did not err in finding that this factor weighed in favor of plaintiff.

Given the above, I would find that the trial court's findings of fact as to the challenged factors were not against the great weight of the evidence. Most of the factors favored neither party and those that favored plaintiff related primarily to defendant's move, which I would have found to have not necessarily improved the quality of the child's life. In sum, on the whole, the trial court's best interest analysis was sound and supported by the evidence. Accordingly, I would hold that the trial court did not abuse its discretion in deciding to modify the parties'

custody order to vest plaintiff sole physical custody of the child and I would affirm the trial court.

/s/ Deborah A. Servitto